

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

APPEARANCES:

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
Attorneys for Coopers & Lybrand, L.L.P.
919 Third Avenue
New York, New York 10022-3897

MICHAEL COOK, ESQ.
Of Counsel

SIMPSON, THACHER & BARTLETT
Attorneys for the § 1104 Trustee
425 Lexington Avenue
New York, New York 10017

M.O. SIGAL, JR., ESQ.
Of Counsel

WASSERMAN, JURISTA & STOLZ
Attorneys for Unsecured Creditors Committee
225 Millburn Avenue
Millburn, New Jersey 07041

DANIEL STOLZ, ESQ.
Of Counsel

GUY VAN BAALEN, ESQ.
Assistant U.S. Trustee
10 Broad St.
Utica, New York 13501

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the Fourth Interim Fee Application (“Fourth Application”) of Coopers & Lybrand L.L.P. (“C&L”), accountant and financial advisor to Richard C. Breeden as trustee in the consolidated case (“Trustee”).

The Fourth Application seeks payment of professional fees in the amount of \$306,723.50

and reimbursement of expenses in the amount of \$11,374.03 incurred during the period May 1, 1997 through September 30, 1997. The Fourth Application was submitted to Stuart, Maue, Mitchell & James Ltd. (“Fee Auditor”) in accordance with the Court’s Amended Order dated December 2, 1996, regarding fee applications subject to review by the Fee Auditor.¹ The report of the Fee Auditor (“Report”) was filed with the Court on December 29, 1997 and argument on the applications was held on January 8, 1998, at which time the Court awarded C&L a provisional award of \$250,000 in fees and \$7,500 in expenses on the Fourth Application.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and the subject matter of the Third Application pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b)(1) and (b)(2)(A) and (O).

FACTS AND ARGUMENTS

This Court previously entered three Memorandum-Decisions, Findings of Fact, Conclusions of Law and Order (“Memo Decisions and Orders”) in the jointly administered case in connection with C&L’s first three interim fee applications.² Familiarity with those three

¹ The Order of October 15, 1996 appointed the Fee Auditor in the Bennett cases. That appointment was not extended to the Aloha cases. On December 2, 1996, the Court amended the October Order.

² By Order dated July 25, 1997, the Bennett and Aloha jointly administered cases were substantively consolidated into a single case.

Memo Decisions and Orders is presumed and they will be referenced herein only to the extent necessary.³

In considering the Fourth Application, the Court will focus on the Report, together with the Reply to Report filed by C&L on January 2, 1998 (“Reply”), as well as the Response of the Official Committee of Unsecured Creditors (“Creditors Committee”), filed January 5, 1998.

C&L’s Reply initially acknowledges that the Fourth Application should be reduced by \$3,452.50 which represents an inadvertent failure to adjust for non-working travel. In addition C&L asserts that the Fee Auditor erroneously included the same time entries in more than one category of proposed disallowance resulting in an “overlap” which amounts to \$77,722.⁴ The Reply also challenges areas of specific criticism contained in the Report such as *inter alia* multiple attendance at events, administrative/clerical tasks, intra office conferences and hourly rates.

The Creditors Committee, in addition to adopting the observations of the Fee Auditor, also alleges that C&L’s composite hourly rate for the instant application period exceeded the agreed upon composite rate cap of \$250 per hour.

C&L in its Reply to the Report specifically seeks to refute the Fee Auditor’s observations with regard to Multiple Attendance at Events asserting that only approximately 1.8% of the time

³ The Court’s Memo-Decision and Order pertaining to C&L’s First Interim Fee Application is dated February 5, 1997, the Memo Decision and Order pertaining to the Second Interim Fee Application is dated August 13, 1997 and the Memo-Decision and Order pertaining to the Third Interim Fee Application is dated April 13, 1998.

⁴ The Court believes that C&L’s assertion that the Fee Auditor “overlaps” time entries thus proposing disallowance of the same hours on more than one exhibit is misplaced. The Fee Auditor adequately explains its methodology at pages 7 and 8 of the Report which is intended to prevent multiple disallowance of the same hours.

reflected in the Fourth Application falls into this category. C&L also disputes the Fee Auditor's assertion that some 14 billing entries constituted "administrative/clerical" tasks pointing out that on at least one of the 14 occasions what appeared to be an administrative task was actually a collection of pertinent records from an area adjacent to the office of one of Debtors' principals which collection was required by the Trustee's attorneys. C&L also points out that the Fee Auditor has "ignored" its voluntary reduction of some \$7,496.50 attributable to "Administrative Support Services," before the Fourth Application was even submitted.

C&L also takes issue with the Fee Auditor's highlighting of persons who billed less than 10 hours during the period and so-called "Long Billing Days" asserting that the latter category was generally necessitated by the time pressures occasioned by the "bank litigation matters."

With regard to the hourly rates focused on by the Creditors Committee, C&L again suggests that it resulted primarily from the bank litigation matters conceding that during the current period the composite rate was \$276.48 as identified by the Fee Auditor.

Finally, C&L defends the time it devoted to conferences with firm and non firm personnel asserting that such conferences were necessary due to the nature of the case and the magnitude of the bank litigations.

With regard to expenses, C&L agrees to delete \$44 for lunches and local transportation and \$1,049.82 to filing documents.

DISCUSSION

The general discussions contained in the Court's first three Memo-Decisions and Orders

are incorporated by reference herein to the extent they are pertinent to the Court's conclusions.

Duplicate Double Billing Entries

The Fee Auditor identifies one entry which appeared to be duplicate or double billings for the same services rendered by "M.Alas." Upon review of the Fee Auditor's Report and the explanation attached to C&L's Reply to Report of Fee Auditor, filed January 2, 1998, the Court agrees that while the time entries for 5/29/98 are confusing, it does appear that "M.Alas" engaged to two distinct activities on that date. The Court will make no adjustment in this category.

Administrative/Clerical Tasks

The Court has reviewed Exhibit C to the Fee Auditor's Report, which is entitled "Administrative/Clerical Tasks," in light of the observations made in its first three Memo-Decisions and Orders. C&L contends somewhat disingenuously that the services identified by the Fee Auditor are not "Administrative/Clerical" because they were performed at the request of Trustee's counsel "in resolving litigation matters." C&L also asserts that the Fee Auditor ignores its voluntary reduction for administrative tasks as set out in paragraph 27 of the Fourth Interim Application. However, there is no way of knowing nor does C&L specifically assert whether that voluntary reduction includes the hours reflected on the Fee Auditor's Exhibit C. While some of the services rendered exclusively by "M.Shellhorse" and reflected on Exhibit C could arguably be considered "Administrative/Clerical," the Court believes that on balance such services do not warrant any adjustment.

Multiple Attendance at Events

The Fee Auditor has identified some 20.20 hours devoted to “Multiple Attendance at Events” as reflected in Exhibit B. C&L, as indicated, points out that this general category comprises only 1.8% of the total hours reflected in the Fourth Interim Fee Application. The Court has considered the hours reflected on Exhibit B and while they may be considered “de minimus,” the Court finds that a total charge of \$3,582.50 for two of C&L’s personnel to attend a Creditors Committee meeting on 5/9/97 exceeds the bounds of reasonableness. The Court will reduce the amount by 50% disallowing \$1,791.25.

Conferences with Non-firm Personnel

The Fee Auditor focuses on C&L conferences with non-firm personnel during the current application period. The Fee Auditor identifies 89.10 hours devoted to such conferences or \$32,897.50. C&L responds that these conferences were primarily with counsel to the Trustee and were vital to coordinating “bank litigation settlements.”

After reviewing the actual time records and recalling the role played by C&L in the bank settlements, the Court concludes that no adjustment is warranted.

Non-working Travel Time

The Fee Auditor Report indicates that while C&L purported to reduce its overall fee request by deleting 50% of its non-working travel hours, in fact, it did not do so and, thus, the total fee request should be reduced by \$3,452.50. C&L does not appear to directly refute the Auditor’s conclusion. Thus, the Court will reduce the total fee request by \$3,452.50.

Long Billing Days

The Court reiterates the observations it made concerning this category as identified by the Fee Auditor in its Memorandum-Decision and Order of April 13, 1998. The Court does note that during the current application period only three of C&L's personnel fell into the instant category. The Court make no adjustment for long-billing days.

Relief From Stay Proceedings

In the Fourth Application, the total number of hours devoted to "relief from stay proceedings" has been greatly reduced, but nevertheless reflects 557.5 hours or \$148,876, approximately 50% of the entire fee requested. The Court has reviewed the time entries isolated by the Fee Auditor on Exhibit V and does not believe that it requires any "across the board" adjustment. While the actual "bank trials" were generally stayed after May 29, 1997, the Court acknowledges the need for C&L to continue with its valuation analysis of individual bank portfolios even though those banks did not thereafter have an individualized hearing. The Court also observes that the number of C&L personnel assigned to these tasks was significantly reduced during the current application period. The Court makes no adjustment to the time devoted to this specific task.

Fee Application

Once again C&L observes that no adjustment in this category is appropriate because it voluntarily reduced its Fourth Application by \$55,000. As noted in its Memorandum-Decision and Order addressing C&L's Third Interim Application, the Court while applauding C&L's

voluntary reduction, has never mandated any “cap” on professional fees at 5% of the total fee application. *See* the Memorandum-Decision and Order on C&L’s Third Interim Fee Application at page 10. Applying the “cap” referenced in that Memorandum-Decision, the Court will award a fee of \$2,120.55 ($\$70,688.50 \times 3\%$).⁵

At pages 17 & 18 of the Fee Auditor’s Report it is pointed out that during the current application period C&L’s composite hourly rate was \$276.48. The Creditors Committee highlights that aspect of the Fee Auditor’s Report in its Response contending that it exceeds the “agreed-upon composite rate cap of \$250 per hour.” (*See* Response of Creditors Committee dated December 31, 1997 at paragraph 3).

In its Reply, C&L acknowledges that the calculation of the Fee Auditor is correct, however, it asserts that the composite hourly rate was skewed by the unusually large amount of partner/director time expended during the current application period due to the bank litigation “thus potentially providing the Estate with millions of dollars to distribute to the unsecured creditors.” (*See* Reply to Report of Fee Auditor of C&L dated December 30, 1997 at ¶ 21). C&L observes that while the current application period reflects a higher than agreed upon composite rate, that for the entire period of its engagement from April 18, 1996 through September 30, 1997, its “cumulative average hourly rate for the period..... is \$230 and, does not exceed the \$250 per hour cap.” (*Id.*)

⁵ The Court recognizes that unlike Simpson, Thacher & Bartlett and other attorney professionals, C&L must and has retained outside counsel to support and defend its fee applications before this Court. Those fees do not appear to be reflected in its Fourth Application. Having reviewed Exhibit R of the Report, and without knowing the extent of outside counsel’s involvement, the Court is receptive to giving consideration to a supplementary request from C&L for reimbursement of reasonable attorneys’ fees as an expense in connection with the application before this Court.

While the observations of both the Fee Auditor and the Creditors Committee are well taken, the Court will accept C&L's calculation of its "cumulative average hourly rate for the period April 18, 1996 through September 30, 1997: and make no adjustment for the \$276.45 hourly rate during the current application period.

Expenses

Turning to C&L's request for expense reimbursement, the Fee Auditor's Report identified a total of \$1,272.82 in expenses that appear objectionable. In its Reply to the Fee Auditor's Report, C&L voluntarily reduces its request for expense reimbursement by \$1,093.82.

The Court has reviewed that voluntary reduction and deems it appropriate. Thus, no further adjustments will be considered.

In summary, the Court makes the following reductions to the fees and expenses sought in C&L's Third Interim Fee Application:

Total Requested Fees	\$ 306,723.50
<u>Disallowances</u>	
Multiple Attendance at Events	- 1,791.25
Non-Working Travel	- 3,452.50
Fee Applications	- 13,567.95
Provisional Fee Award granted August 12, 1997	- 250,000.00
<u>Net Total Fees Allowed</u>	\$ 37,911.80

<u>Total Requested Expenses</u>	\$ 11,374.03
Consensual Expense Production	1,093.82
Provisional Expense Award August 12, 1997	7,500.00
<u>Net Total Expenses Allowed</u>	\$ 2,780.21

Dated at Utica, New York

this 21st day of September 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge